

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

RONELL LEE ISAAC,

Defendant and Appellant.

A121907

(Lake County  
Super. Ct. No. CR911109)

A jury convicted defendant Ronell Lee Isaac of two counts of attempted voluntary manslaughter (Pen. Code, §§ 664/192, subd. (a)),<sup>1</sup> and found true allegations that he had personally inflicted great bodily injury (§ 12022.7, subd. (a)) and had personally used a firearm (§ 12022.5, subd. (a)). The jury also found defendant guilty of possessing a firearm after having been convicted of a felony (§ 12021, subd. (a)(1)). In a bifurcated proceeding, the trial court found true the section 667.5, subdivision (b) allegation that defendant had served a prior prison term for drug possession (Health & Saf. Code, § 11350, subd. (a)) with a firearm enhancement (§ 12022, subd. (a)(1)). He was sentenced to an aggregate term of 25 years 6 months.

Defendant contends he was denied his right to trial by jury on the factor used to impose the upper terms on the firearm use enhancements. He also claims the trial court erred in using the same fact to support both a consecutive term on the second attempted

---

<sup>1</sup> All subsequent statutory references are to the Penal Code except as otherwise indicated.

voluntary manslaughter count and the upper term on its associated gun use enhancement. We affirm.

### **FACTUAL BACKGROUND AND PROCEDURAL HISTORY<sup>2</sup>**

On October 12, 2006, defendant was seated in a silver Ford Taurus in front of the apartment building where he lived. Kenneth Woodford and Georgenia Faith, who were well acquainted with defendant, drove past the building in their truck on their way to pick up one of their children at preschool. As they drove past, defendant began driving closely behind them. Woodford was concerned because they had recently had conflicts with defendant, so he and Faith decided to pull over before getting to the preschool to see what defendant wanted. Defendant pulled his car behind theirs and approached them as they got out of their truck. Defendant was holding a gun. After stating “Say something now,” he shot both of them multiple times. They survived the shooting and testified against him at trial.

On March 22, 2007, an information was filed charging defendant with two counts of attempted murder (§ 664/187, subd. (a)), two counts of assault with a firearm (§ 245, subd. (a)(2)), possession of a firearm following a felony conviction (§12021, subd. (a)(1)), and vandalism (§ 594, subd. (a)). The information further alleged that he had personally inflicted great bodily injury with respect to both victims (§ 12022.7, subd. (a)), and had personally discharged and used a firearm. (§§ 12022.53, subds. (b), (c) & (d); 12022.5, subd. (a).) The information also alleged he had previously served a prison term following a conviction of felony drug possession in 2000 (§ 667.5, subd. (b)).

On May 15, 2008, defendant was convicted by a jury of two counts of the lesser included offense of attempted voluntary manslaughter. (§§ 664/192, subd. (a).) The jury also convicted him of possession of a firearm following a felony conviction, and found the great bodily injury and firearm use enhancement allegations to be true. The jury was unable to reach a verdict on the remaining counts, and the court declared a mistrial as to those.

---

<sup>2</sup> As defendant does not challenge his convictions, we need only concisely recite the facts pertinent to the underlying convictions as necessary to our limited review on appeal.

On June 20, 2008, the court sentenced defendant to an aggregate term of 25 years 6 months, calculated as follows: the upper term of 5 years 6 months for the first count of attempted voluntary manslaughter and a consecutive one-year term for the second count; a consecutive term of 8 months for the firearm possession count; 10 years for the first firearm use enhancement and a consecutive term of 3 years 4 months for the second; 3 years for the first great bodily injury enhancement and one year for the second; and one year for the prior prison term enhancement. This appeal followed.

## **DISCUSSION**

### ***I. Imposition of the Upper Term for the Firearm Use Enhancements***

#### ***A. The Sentencing Hearing***

The trial court imposed the upper term of 10 years for the first firearm use enhancement under section 12022.5, subdivision (a) which provides, in relevant part: “[A]ny person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense.” The court chose one-third of the upper term for the firearm use enhancement on the second count, sentencing defendant to an additional consecutive term of 3 years 4 months. Appellant claims he was denied a jury trial as to the factor used to impose the upper term for these enhancements.

After discussing various aggravating factors, including defendant’s prior convictions and their increasing seriousness, as well as his poor performance while on probation and parole, the trial court imposed the upper term on the first attempted voluntary manslaughter count. The court then indicated it was selecting the upper term on the first firearm use enhancement, “For the reason that the defendant engaged in violent conduct which indicated a serious danger to society and that was based on the evidence, the jury did make the finding as to the 12022.5 as well as the great bodily

injury on two victims, multiple gunshot wounds done in the middle of the day in public.<sup>[3]</sup> [¶] So the court is going to impose ten years then for the 12022.5 as an enhancement.” The court did not explicitly rely on defendant’s criminal history in imposing the upper term on this enhancement.

### ***B. Determinate Sentencing Law***

In 1976, the Legislature passed the Determinate Sentencing Law (DSL), which constituted an attempt to provide uniformity in sentences of offenders committing the same offense under similar circumstances. Sections 1170 and 1170.1 were enacted as part of the DSL. At that time, section 1170, subdivision (b), governed sentencing for substantive offenses. The original version provided that “the court shall order the middle of the three possible terms of imprisonment, unless there are circumstances in aggravation or mitigation of the crime.” (Former § 1170, subd. (b).) The statutory provision governing enhancements punishable by three possible terms is found in section 1170.1, subdivision (d), and is similar to the language of the original version of section 1170, subdivision (b).

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490, the United States Supreme Court held that, “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Subsequently, that court reviewed California’s DSL in light of *Apprendi*, and concluded that the former version of section 1170, subdivision (b), created a presumption that the middle term was the statutory maximum to which a defendant could be sentenced. (*Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*).) In *Cunningham*, the court reiterated: “[T]he Federal Constitution’s jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, *other than a prior conviction*, not found by a jury or admitted by the defendant.” (*Id.* at pp. 274–275, italics

---

<sup>3</sup> The court appears to have based its finding on California Rules of Court, rule 4.421(b)(1), which lists as an aggravating factor that the defendant “has engaged in violent conduct that indicates a serious danger to society . . . .”

added.) Accordingly, the court reasoned that California's DSL violated a defendant's right to a jury trial because it permitted a judge to find facts by a preponderance of evidence exposing a defendant to an elevated upper term. (*Id.* at p. 293.)

In response to the *Cunningham* decision, section 1170, subdivision (b), was amended by urgency legislation to remove the statutory middle term presumption. Senate Bill No. 40 amended section 1170 so that (1) the middle term is no longer the presumptive term absent aggravating or mitigating facts found by the trial judge; and (2) a trial judge has the discretion to impose an upper, middle or lower term based on reasons he or she states. As amended, section 1170 now provides as pertinent: "When a judgement of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . The court shall select the term which, in the court's discretion, best serves the interest of justice. The court shall set forth on the record the reasons for imposing the term selected . . . ." (§ 1170, subd. (b).) This amended version of section 1170 became effective on March 30, 2007. (Stats. 2007, ch. 3, § 2.)

However, the urgency legislation did not change section 1170.1, subdivision (d), which still establishes a presumption that the middle term is the maximum sentence for an enhancement where three possible terms are provided. (*People v. Lincoln* (2007) 157 Cal.App.4th 196, 205.) Section 1170.1, subdivision (d) provides, "If an enhancement is punishable by one of three terms, the court shall impose the middle term unless there are circumstances in aggravation or mitigation . . . ." In *Lincoln*, the Second District held that this provision "suffers from the identical constitutional infirmities identified by the United States Supreme Court in *Cunningham* [citation], and is similarly unconstitutional. The Legislature has taken no step to amend this provision to render it compliant with the Sixth Amendment, and the California Supreme Court did not reform it in *Sandoval* [citation]."<sup>4</sup> (*Lincoln, supra*, at p. 205.) While we agree generally with the appellate

---

<sup>4</sup> *People v. Sandoval* (2007) 41 Cal.4th 825.

court's assessment of section 1170.1, no constitutional violation occurred in the present case.

***C. Recidivist Factors Justify the Imposition of the Aggravated Term***

Defendant's probation report indicates he had been arrested three times as a juvenile, including one instance in which he was declared a ward of the court. As an adult, from 1991 to 2003, defendant sustained 10 convictions, including the 2000 conviction that led to his prior prison term.<sup>5</sup> In spite of this criminal history, defendant claims that, as the factor cited by the court to impose the aggravated term on the first firearm use enhancement was neither admitted by appellant nor established by the jury's verdict, his Sixth Amendment rights were violated by the imposition of the upper terms on the enhancements. The trial court did find several recidivist factors, though the People concede these factors were cited by the court in imposing the upper term for the substantive offenses, not for the enhancements. Regardless, because the record shows defendant has numerous prior convictions and a history of unsatisfactory performance on probation and parole, we conclude his sentence to the upper term did not violate his Sixth Amendment rights.

In the aftermath of *Cunningham*, the California Supreme Court held in *People v. Black* (2007) 41 Cal.4th 799, 816 (*Black II*) that if a single aggravating factor has been established in a manner consistent with *Blakely*<sup>6</sup> and *Cunningham*—by the jury's verdict, the defendant's admissions, or the fact of a prior conviction—the imposition by the trial court of the upper term does not violate the defendant's Sixth Amendment right to a jury trial, regardless of whether the trial court considered other aggravating circumstances in deciding to impose the upper term. “[S]o long as a defendant is *eligible* for the upper

---

<sup>5</sup> Specifically, the probation report states that defendant's adult record includes one conviction for resisting arrest (§ 148), one conviction for hit and run (Veh. Code, § 20002), four convictions for driving on a suspended license (Veh. Code, §§ 14601, 14601.1, subd. (a)), three convictions for driving under the influence of alcohol (Veh. Code, § 23152, subd. (a)), one conviction for driving without a license (Veh. Code, § 12500, subd. (a)), one conviction for being under the influence of a controlled substance (Heath & Saf. Code, § 11550), and the conviction for felony possession of a controlled substance (Health & Saf. Code, § 11350) with an associated firearm enhancement (Pen. Code § 12023, subd. (a)).

<sup>6</sup> *Blakely v. Washington* (2004) 542 U.S. 296.

term by virtue of facts that have been established consistently with Sixth Amendment principles, the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury.” (*Black II, supra*, at p. 813.)

The court in *Black II* also affirmed that the right to a jury trial does not apply to the determination of the aggravating circumstance that the defendant’s prior convictions are numerous or of increasing seriousness. “The United States Supreme Court consistently has stated that the right to a jury trial does not apply to the fact of a prior conviction. [Citations.] ‘[R]ecidivism . . . is a traditional, if not the most traditional, basis for a sentencing court’s increasing an offender’s sentence.’ [Citation.]” (*Black II*, 41 Cal.4th 799, 818.) The court concluded that the exception for the fact of a prior conviction also “permits the trial court to decide whether a defendant’s convictions are ‘numerous or of increasing seriousness.’ ” (*People v. Towne* (2008) 44 Cal.4th 63, 75–76; see also *Black, supra*, at p. 820.)

Moreover, the court in *Black II* decided that the prior conviction exception to the right to a jury trial extends to any aggravating circumstance related to the “defendant’s criminal history” or recidivism “that may be determined by examining the records of the prior convictions.” (*Black II, supra*, 41 Cal.4th 799, 818, 819.) Our Supreme Court has further held: “When a defendant’s prior unsatisfactory performance on probation or parole is established by his or her record of prior convictions, it seems beyond debate that the aggravating circumstance is included within the *Almendarez-Torres*<sup>7</sup> exception and that the right to a jury trial does not apply.” (*People v. Towne, supra*, 44 Cal.4th 63, 82.)

Here, as in *Black II*, defendant’s criminal history, although not expressly mentioned by the trial court in support of the sentence choice on the firearm use enhancements, qualified the upper terms as the statutory maximum sentence. In

---

<sup>7</sup> *Almendarez-Torres v. United States* (1998) 523 U.S. 224.

discussing the aggravating circumstance of defendant's prior convictions, the court observed: "Now, the Court doesn't look at those as particularly serious crimes in the scale of things compared to what happened here in this case, but what is disturbing, and the DA kind of pointed it out, he was placed on summary probation on six different occasions and each subsequent occasion he was still on that summary probation from the Court when he committed a new offense." The court further noted that while on parole, appellant had reoffended and received a year in county jail. Thus, even assuming improper reliance by the trial court upon some aggravating circumstances, we must follow the authority of the California Supreme Court's decision in *Black II* to find that imposition of the upper terms did not infringe upon the defendant's constitutional right to jury trial. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *People v. Sullivan* (2007) 151 Cal.App.4th 524, 563; *People v. Scott* (2000) 85 Cal.App.4th 905, 915–916.)

In sum, as defendant's prior convictions, and his unsatisfactory performance on probation and parole, rendered him eligible for the upper terms on the firearm use enhancements, we find that the imposition of the upper terms on the two enhancements did not violate his right to a jury trial under the Sixth Amendment. We thus need not address the People's alternative argument that any sentencing error is harmless.<sup>8</sup>

## ***II. Use of the Same Fact to Support Consecutive Term and Firearm Use Enhancement***

Defendant claims the trial court erred in imposing both a consecutive term on the second attempted voluntary manslaughter count and the aggravated term on its associated firearm use enhancement. He claims the court violated the principle against the dual use of an aggravating factor (see *People v. Calhoun* (2007) 40 Cal.4th 398, 408) when it relied on the fact that defendant had committed separate acts against separate victims as justification for both of these sentencing decisions. He asserts, "[w]hile a consecutive

---

<sup>8</sup> We take this opportunity to note that California Rules of Court, rule 4.428 provides, in part: "No reason need be given for imposing a term for an enhancement that was charged and found true." At least with respect to enhancements having multiple sentencing options, this rule appears to invite judicial error, especially in cases where the defendant does not have a criminal history.



sentence was authorized” based on the fact that defendant “shot a second person,” the “upper term on the gun use enhancement was not.” He further contends that the error was prejudicial under *People v. Watson* (1956) 46 Cal.2d 818.

The People contend that defendant’s dual-use claim is forfeited because he did not object at trial. Defendant asserts that his trial counsel did raise an objection to the court’s “overusing the facts” in connection with the imposition of the aggravated term on the firearm use enhancements. We decline to find a waiver and proceed to the merits of this claim.

In deciding to impose a consecutive term on the second attempted voluntary manslaughter count, the trial court found defendant had committed separate acts of violence against each victim. With respect to the second firearm use enhancement, the court stated: “And in reading the case law that we discussed earlier [regarding consecutive sentencing in a case with multiple victims], the Court also feels that the 12022.5 is appropriate enhancement as to each of the counts since they are separate acts, separate victims; and the Court is going to impose one-third of the ten year sentence.” Defendant concedes that consecutive sentences were authorized because two separate individuals were harmed. Instead, he challenges the authority of the trial court to rely on this fact in imposing the upper term on the second gun use enhancement.

Preliminarily, it is unclear that the court relied on the separate victim/separate act circumstance in determining the sentence imposed on the second enhancement. Section 1170.1, subdivision (a), provides, in part: “The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and *shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses.*” (Emphasis added.) This language does not impose upon punishments for their appended enhancements the same *middle term* limitation applicable to sentences for subordinate, consecutively punished substantive offenses. And pursuant to *Black II* once the prior record or some other *Cunningham*-qualified fact provides that the full determinate sentence range is available to the court, the court may exercise its

discretion on the basis of a wide range of considerations. “Under established authority, the same fact may be used both to deny probation and to support imposition of an upper term sentence. (*People v. Scott* (1994) 9 Cal.4th 331, 350, fn. 12 [36 Cal.Rptr.2d 627, 885 P.2d 1040]; see Advisory Com. com., Cal. Rules of Court, rule 4.420.) An aggravating circumstance is a fact that makes the offense ‘distinctively worse than the ordinary.’ (*People v. Moreno* (1982) 128 Cal.App.3d 103, 110 [179 Cal.Rptr. 879]; see *People v. Young* (1983) 146 Cal.App.3d 729, 734 [194 Cal.Rptr. 338].) Aggravating circumstances include those listed in the sentencing rules, as well as any facts ‘statutorily declared to be circumstances in aggravation’ (Cal. Rules of Court, rule 4.421(c)) and any other facts that are ‘reasonably related to the decision being made.’ (Cal. Rules of Court, rule 4.408(a).)” (*Black II*, *supra*, 41 Cal.4th 799, 817.)

The trial court, although without concisely attaching each of them to individual sentence choices, recited a substantial catalogue of aggravating considerations. Some of these were: defendant’s substantial criminal history; his demonstrated dangerousness; his attack on multiple victims; his lack of remorse; his planning (if not sophisticated) for the offenses; his prior bad performance on probation; and his infliction of multiple wounds on each victim. Any one of these articulated factors provides a rational basis, pursuant to *Black II* and the California Rules of Court, for the choice of an aggravated term. Even allocating dangerousness to the choice of the aggravated principal term for Count I and multiple victims to the choice of the consecutive term on Count II, we are left with far more than enough articulated rational reasons to justify the court’s selection of the upper term for each of the firearm use enhancements.

We think the trial court was motivated by a calmly considered need to provide a sentence as long as possible for a man with a substantial record of past criminal behavior who had perpetrated the present appalling offenses. Any failure to assign the large number of aggravating circumstances with artful precision neither prejudices the defendant nor vitiates the sentence.

## DISPOSITION

The judgment is affirmed.

---

Graham, J.\*

We concur:

---

Marchiano, P. J.

---

Margulies, J.

---

\* Retired judge of the Superior Court of Marin County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.